United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF FOR REHEARING EN BANC

ORIGINAL

74-1793

B P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RACHEL EVANS, STEVEN R. KIDD, FERNELL PATTERSON and WALTER B. BROOKS, JR., on behalf of themselves and all others similarly situated,

Appellants,

against

JAMES T. LYNN, Secretary, Department of Housing and Urban Development, *et al.*,

Appellees,

and

TOWN OF NEW CASTLE,

Intervenor-Appellee.

BRIEF FOR INTERVENOR-APPELLEE ON REHEARING *EN BANC*

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ERRATA SHEET

The brief of Intervenor-Appellee should be corrected as follows:

Page iii - 2nd line, first world "Castle" should read "Canaan"

Page 32 - 15th line, second word "mehtod" should read "method"

Page 48 - 17th line, last world "Castle" should read "Canaan"

Page 49 - last line, fourth word "218" should read "318"

Dated: October 30, 1975
New York, New York

GOLENBOCK AND BARELL
Attorneys for Intervenor-Appellee
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TABLE OF CASES CITED

RULES, STATUTES AND OTHER AUTHORITIES

COUNTER-STATEMENT OF ISSUES

1. Did the District Court correctly dismiss appellants' complaint for lack of standing where the complaint failed to allege that the challenged actions of the governmental defendants in approving the sewer and park grants caused appellants actual or threatened injury and the stipulated record facts establish the lack of any injury to appellants?

2. Did the District Court correctly dismiss appellants' complaint where the complaint sought an injunction restraining the payment of the federal grants to the intervenor-appellant and the stipulated record facts establish lack of any injury to appellants?

3. Does the complaint state a claim upon which relief may be granted where (a) appellants seek to challenge the legality of Town's zoning ordinance notwithstanding their admitted lack of interest in any land, property or any proposed construction of housing in Town; (b) the governmental defendants are under no affirmative duty to construct, plan or promote low income multi-family housing in Town; and (c) the sewer and park projects are not alleged to be tainted by unlawful discrimination and appellants have so stipulated?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RACHEL EVANS, STEVEN R. KIDD, FERNELL PATTERSON and WALTER B. BROOKS, JR., on behalf of themselves and all others similarly situated,	:	
Plaintiffs-Appellants,	:	
-against-	:	Docket No.
JAMES T. LYNN, Secretary, Department of Housing and Urban Development, et al.,	:	74-1793
Defendants-Appellees,	:	
-and-	:	
TOWN OF NEW CASTLE	:	
Defendant-Intervenor-Appellee.	:	

BRIEF FOR APPELLEE
TOWN OF NEW CASTLE
ON REHEARING EN BANC

Preliminary Statement

This appeal comes before the full Court for rehearing of the original panel's sharply divided decisions of June 2, 1975. Petitions for rehearing en banc were filed by both the intervenor-appellee and the federal appellees. The principal grounds for said petitions were that the Court's June 2, 1975 decision:

(i) contains questions of exceptional importance concerning the proper legal test for determining the threshold issue of standing to sue and the existence of a case or controversy within the meaning of Article III of the Constitution; and

(ii) in interpreting the meaning of "injury in fact" conflicts with prior decisions of this Court and the United States Supreme Court, and was decided prior to the recent decision of the United States Supreme Court in Warth v. Seldin, ____ U.S. ____, 45 L. Ed.2d 343 (1975), affirming the decision of this Court, 495 F.2d 1187 (2d Cir. 1974), which reiterated the injury in fact prerequisite for standing.

By order dated August 11, 1975 signed by Chief Judge Irving R. Kaufman the petitions for rehearing en banc were granted.

This brief is respectfully submitted on behalf of Intervenor-Appellee Town of New Castle ("Town") urging this Court to reverse the panel's June 2, 1975 decision and affirm the order of Judge Pollack dismissing the complaint.*

*The District Court's opinion is reported at 376 F. Supp. 327.

Statement of the Case

The instant lawsuit represents a bold coercive effort to restrain the funding of two federal grants to admittedly non-discriminatory projects having nothing to do with housing in order to induce a change in the existing zoning ordinance of appellee Town. The grant of the Department of Housing and Urban Development ("HUD") to the King-Greeley Sewer District ("King-Greeley") is for the construction of a new sewer system to replace the inadequate septic system previously in use (47a-52a).* The grant of the Bureau of Outdoor Recreation, Department of Interior ("BOR") to Town is for development and use of Turner Swamp as a wetlands preservation area for environmental, educational and recreational use (52a-54a). No claim is made by appellants that Town or King-Greeley have in the past or intend in the future to bar persons from the use of the sewer and admission to the park facilities on the basis of race, creed, religion, national original or other unlawful basis (85a).

Appellants' claim of standing does not rest on any allegation of unlawful exclusion from use of these projects. Appellants, among other things, have stipulated that they have not sought housing in the Town for themselves or

*References throughout except as otherwise noted are to the Joint Appendix filed with the Court.

members of their families (85a). No claim is made that appellants have any interest in or connection with the grants and they have stipulated that none of the federal funds granted to the Town were diverted from the communities in which appellants presently reside (85a).

The complaint does not name Town or King-Greeley as parties defendant (1a-16a). Nonetheless, it is alleged the Town engaged in "discriminatory land use practices" (3a, 4a, 6a, 9a) by reason of its existing zoning ordinance which provides for single-family residential development and prohibits multi-family housing thereby in effect mandating "only the most expensive form of housing in New Castle" (11a). This condition, according to the complaint, means that "only the most wealthy can afford to live in New Castle", and has resulted in "a disproportionately white, disproportionately wealthy population" and exclusion of low income black and Spanish-speaking people (10a-11a).*

The complaint alleges that the federal appellees in approving the sewer and park grants to Town failed in their duty to affirmatively promote fair housing and violated

*Appellants overlook the fact, discussed more fully below, that the King-Greeley section is the oldest and most settled portion of the hamlet of Chappaqua, and the majority of its residents are persons of the low and lower income ranges residing in houses more than 30 years old, including some multiple dwellings constructed prior to the 1930 enactment of the Town's zoning ordinance (46a).

the Fifth Amendment and various federal statutes (1a, 13a). An injunction is demanded restraining disbursement of the federal funds "until New Castle ceases from engaging in land use practices which exclude minority and low-income people from its boundaries" as well as a declaratory judgment and other relief (14a-16a).

Proceedings Below

By notice of motion dated September 13, 1973 the federal defendants moved to dismiss the complaint pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure (17a-18a). Defendants Carroll and Tri-State similarly moved by notice of motion dated September 24, 1973 (19a-24a). Plaintiffs moved for class action determination and for preliminary injunction restraining disbursement of the funds under grants approved to the Town (19a-22a; 92a).

On October 19, 1973, the return date of these motions, the Court in a preliminary discussion with counsel (other than counsel for Town which was not then a party) indicated that it would aid any evidentiary hearing that might be required if the federal appellees filed and served the administrative records of these grants (94a-95a), which was done. Plaintiffs were permitted to take depositions of certain government officials, extracts of which are reproduced in the Joint Appendix. Although the District Court discussed

some of this material, it did not go beyond those relevant to that issue.*

On March 9, 1974, Town and King-Greeley applied for leave to intervene as parties defendant in this action (64a, 82a-83a). Thereafter with leave of the Court the intervenors, pursuant to notice dated and served March 13, 1974 conducted the oral depositions of appellant Rachel Evans to ascertain facts relative to her legal standing to sue (64a).

The District Court's Opinion and Order

After reviewing the pertinent facts regarding the background of the grants and plaintiffs' utter lack of connection therewith, Judge Pollack held that plaintiffs failed to meet the standing test articulated in such cases as Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970); Warth v. Seldin, 495 F.2d 1187 (2d Cir. 1974) (98a, 100a). According to Judge Pollack:

*Since the District Court dismissed the complaint on jurisdictional grounds, to wit, lack of standing and did not reach the merits of plaintiffs' claim (102a), no evidentiary hearing was held. Accordingly, the witnesses deposed by plaintiff never testified in open court and were never subject to cross examination. Objections to this deposition testimony on grounds of admissability, relevancy, etc. were not ruled upon. Indeed, Town was not even present at the depositions. Since these depositions were not admitted in evidence below, they are not binding upon Town and should not be considered by this Court on this appeal. Under these circumstances, the reference to such non-evidentiary "facts" in Judge Oakes' opinion, including a book quoting statements appearing in the New York Times, does not appear appropriate (see e.g., Slip Op. 3890-91, n. 7).

> "Litigants who seek to vindicate their own value preferences through the judicial process where there is neither injury in fact to plaintiff nor a personal stake in the outcome of the controversy, viz., an actual and immediate interest, lack standing to sue" (100a-101a).

The District Court correctly held that the plaintiffs did not and could not allege that they had sustained any injury resulting from the park and sewer grants. The District Court also recognized that although the plaintiffs were not directly challenging the zoning ordinance as in Warth v. Seldin, supra, the actions of the federal appellees could not be declared unlawful absent a determination that the zoning ordinance results in unconstitutional racial and economic segregation of appellants. Such determination could not be made under Warth. Appellants, "potential residents" of the Town, could "claim at best only a remote, speculative injury, and a speculative injury cannot be made the cornerstone of standing" (104a).

Since the standing requirement is jurisdictional, the District Court, following the clear mandate of the United States Supreme Court, correctly declined to consider the merits of the case, and dismissed the complaint (107a).

The Opinion of the Panel

Judge Pollack's decision was reversed by a sharply divided opinion of a panel of this Court. The majority opinion was written by Judge Oakes with the partial concurrence of Judge Gurfein and Judge Moore dissenting.

Judge Oakes concluded that plaintiffs have standing not because they demonstrated any personal injury stemming from the federal sewer and park grants they challenged but "purely and simply because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development." Thus, Judge Oakes dispensed with the traditional prerequisite of standing -- the existence of "injury in fact". Judge Oakes expressly acknowledged that appellants lack "a sufficient connection with the community to or for the benefit of which the grants are made" (Slip Op. 3899).

Judge Oakes would thus have the federal courts monitor administrative actions at the instance of any individual who disagreed with such actions so long as such plaintiff claimed to be advancing a Congressional policy set forth in a statute. Absent any allegation of personal injury and compliance with Article III's requirement of a

case or controversy, the courts would be burdened with reviewing and determining the propriety of administrative action. Such a result, among other things, is repugnant to the constitutional doctrine of separation of powers between the three branches of government and directly contravenes pertinent Supreme Court standing decisions.

Judge Gurfein concurred in part and thus joined Judge Oakes in concluding that appellants had standing to obtain review of the administrative procedures utilized by the federal appellees (Slip Op. 3918-19). However, it is clear that Judge Gurfein refused to hold that appellants had standing to enjoin the grants at bar. Judge Gurfein stated:

> "I would not hold that the plaintiffs necessarily have standing to seek injunctive relief against the Secretary of HUD and his assistants to restrain the grant of federal funds, for that involves the preliminary question of whether a determination by HUD to grant funds to New Castle is subject to judicial review and if so, at whose instance, a matter we need not decide if we simply reverse the summary judgment.

Judge Gurfein also stated:

> In my view, a person may be an 'aggrieved person' within the meaning of the Administration Procedure Act, 5 U.S.C. §702, to remedy administative enaction without necessarily having standing for other relief. He may be aggrieved by HUD's failure to perform its statutory duty of inquiry, which is for his class benefit. He may not have been injured in fact sufficiently to coerce the executive agency to withhold funds." (Slip Op. 3919-20).

Only Judge Moore in his dissenting opinion undertook to analyze and apply the controlling Supreme Court decisions on standing. He examined the basis and purpose of the rules of standing in our constitutional system of government, and concluded that adherance to the standing prerequisites was mandated. In addition, Judge Moore recognized that appellants had not demonstrated any of the essential prerequisites of standing. He stated:

> "[Plaintiffs] do not claim that they have been denied housing or land purchase in New Castle because of color. They do not seek to overturn the New Castle's zoning ordinances as unconstitutional. They do not assert that the funds appropriated will deprive any low-cost housing project thereof. They do not claim that there are any discriminatory features in the sewer and swamp grants." (Slip Op. 3908).

Accordingly, Judge Moore held that appellants failed to satisfy the well established criteria for standing set forth in numerous United States Supreme Court cases, and voted to affirm the District Court.

Statement of Facts

A. Description of Town and King-Greeley

Town is located in northern Westchester County and consists of part of the Village of Mt. Kisco, the hamlets of Chappaqua and Millwood, and parts of Ossining and Briarcliff Manor. It has a land area of approximately 25 square miles, and

its present population is approximately 20,000 (45a).

King-Greeley and Town are not the same. King-Greeley is an Improvement District duly organized and existing pursuant to Art. 12-A of the N.Y. Town Law (McKinney 1965). It has no legal power or authority to enact or modify the Town's zoning ordinance.

Although appellants characterize the federal grants as going to a predominantly white and well-to-do enclave (App. Br., 6), this is not an accurate description of King-Greeley. As noted above, King-Greeley is the oldest and most settled portion of the hamlet of Chappaqua. It is approximately one mile square and is zoned for 1/4 acre and 1/2 acre housing as well as business uses. Much of the housing is on less than 1/4 acre lots, having been built prior to the enactment of the Town's Zoning Ordinance in 1930. Such pre-1930 construction also includes some multi-family housing (46a).

The greater majority of the residences in King-Greeley are more than 30 years old, and are occupied by persons of the low and lower middle income ranges, although

the district also contains some expensive residences (46a).

King-Greeley has been characterized as "densely populated" including more than 330 structures, most of which are residences. In addition, there are four religious facilities, numerous businesses, a local library and two schools (46a; see Item 6 of Draft Environmental Clearance Worksheet, Plf. Ex. 1, Doc. 6).*

Depriving King-Greeley of federal funds to construct its sewer system cannot coerce King-Greeley into modifying its zoning. First, King-Greely has no authority with respect to zoning. Second, the area is already "saturated" with residential housing much of which was constructed prior to the enactment of the present zoning ordinance on lots smaller than presently required (47a).

*Plf. Ex. 1 is the federal appellees' administrative file filed with the Court below.

B. Plaintiffs-Appellants

The sworn deposition testimony of appellant Rachel Evans* sharply contradicts the allegations of the complaint and together with the Stipulation of Facts dated April 5, 1974 (84a-86a), establishes appellants' lack of standing and the absence of a justiciable controversy.

Although the complaint verified by Mrs. Evans alleges she resides in "a deteriorated building slated for demolition in the near future" and is "not able to find decent housing" (Compl., par. 3) and alleges that plaintiffs and others (i.e., "black and Spanish-speaking persons and all other persons of low income") would be deprived of the benefits of the federally funded sewer and park project (Compl., pars. 21, 23), the admitted facts are quite different (65a-67a):

(a) Mrs. Evans swears that since September 1973, she resides in "decent housing" (Tr. 43**), a six-room apartment with 1-1/2 baths in a public housing development (Tr. 3, 9, 12-13). Her neighbors are people of all races

*The transcript was filed with the Court along with Town's and King-Greeley's motion to dismiss the complaint (64a).

**"Tr." refers to pages of the Evans' deposition transcript filed with the District Court.

(Tr. 44). Her residence is not scheduled for demolition and she intends to continue residing there -- "the space is fine" (Tr. 18, 21, 27, 43).

(b) Her home is within walking distance of a park, accessible to her children (Tr. 21, 27). Mrs. Evans has no problem with her sewer system (Tr. 30-31).

(c) She at no time has sought to secure housing anywhere in Town, and does not know the area known as King-Greeley (Tr. 31-32). Although she has heard of Turner Swamp, she does not know where it is or whether she has even been to it (Tr. 32).

(d) In explaining the allegations of her verified complaint that she is denied an opportunity to share in the benefits extended to Town, Mrs. Evans conceded that she could not participate in the benefit of any sewer system other than the one which served her residence (Tr. 34-35), and that even residence in Town would not assure her of use and benefit of the sewer system at bar, if she did not actually reside in King-Greeley (Tr. 36). Accordingly, she could point to no benefit she would gain or injury she would suffer as a result of the sewer grant to King-Greeley.

(e) With respect to her allegations of injury

flowing from the preservation of the wetlands of Turner Swamp, Mrs. Evans acknowledged that she did not claim that members of the public, who were not residents of Town would be denied admittance. Nor did she have reason to believe that she would be denied admittance (Tr. 37). Her claim of lack of opportunity to enjoy the proposed park of Turner Swamp (Compl., par. 23) is based on the fact that she does not have a car (Tr. 37), and even with transportation, such facilities are inaccessible "because from where I live it's completely out of my way" (Tr. 40). Significantly, Mrs. Evans conceded that she would regard the park as inaccessible even if she lived in Town if it was not within walking distance (Tr. 40).

Mrs. Evans, in short does not claim that she desires or has sought or has been denied the use and benefit of the funds for the proposed sewer and park project challenged in this suit. The basis of her complaint is best explained by her own testimony:

> "I have the understanding that these grants are issued to benefit the poor communities, the communities that really need these facilities. *** From what I have seen of New Castle, it is not a poor community at all. That's my objection, not New Castle, just because of the name New Castle, but I would object just as strongly if it was any other rich area in any other town." (Tr. 52-53).

The Stipulation of Facts (84a-86a) confirms that the other named appellants are in substantially the same legally deficient position as Mrs. Evans. The Stipulation establishes that none of the other appellants have any interest in the federal grants at bar or have sustained any actual or threatened injury by reason of the challenged governmental conduct. Thus, it is stipulated that:

(a) None of the named plaintiffs has sought housing in the Town (Stip., par. 1).

(b) None of the named plaintiffs or any political sub-division in which they reside applied for or was deprived of the federal funds granted to Town and King-Greeley (Stip., par. 2); and

(c) Plantiffs do not claim that the sewer and park projects will be operated on a discriminatory basis, and that the benefits of the projects will be denied to persons on the basis of race, creed, color or income (Stip., pars. 3, 4, 5).

C. The King-Greeley Sewer Project

There is an acute need for the sewer project which has been under consideration for approximately ten years. King-Greeley being the older more settled portion of the

hamlet has largely inadequate septic fields and septic tank disposal systems. Because of King-Greeley's rocky terrain, the soils are unable to absorb additional wastes. As a result, numerous residences have suffered septic failures in recent years. As stated in King-Greeley's application for federal funds: "The faulty systems are causing spillage of raw sewage over land and creating a public nuisance and serious potential health problem for the area and the entire town". Because of the inadequacies of the present system, there is no room for expansion (47a-48a; Plf. Ex. 1, Doc. 13).

Furthermore, the terrain of King-Greely, makes for an expensive sewer project. It was originally estimated that the total cost would be $1,747,500 and the present or estimated cost is $2,100,000. The HUD grant amounts to $358,300 (see Plf. Ex. 1, Docs. 13, 31). The federal contribution will substantially reduce the burden on individual King-Greely property owners many of whom are working class and lower middle class people. By calculating principal and interest costs, absent the federal grant, each property owner will be compelled to pay approximately 25% more per annum for this sewer facility (47a).

The sewer project will not limit the future growth of King-Greeley. It is sufficient in size to handle existing

King-Greely buildings as well as any new construction, including multi-family residences and substantial business development, which might subsequently be built in King-Greely (49a; 50a; see Plf. Ex. 1, Doc. 22). Thus, any claims that appellants make that the project may have potential discriminatory effects because of limitations imposed on potential growth are inapplicable to the present case.*

The planned sewer project was endorsed by the Westchester County Department of Health, Westchester County Department of Planning and New York State Department of Environmental Control. In its endorsement, the Westchester County Department of Planning stated that the extension of sewers into the service area is fully consistent with the county-wide land use element recommendations, will greatly improve the environmental and public health aspects of the area, and will not affect the range of densities of the area (48a; Plf. Ex. 1, Doc. 31, p. 2; 71a-72a; 73a-74a).

There is no policy or plan to exclude any resident or property from use and benefit of the sewer on the basis of race, creed, religion, income or other discriminatory basis (49a). In connection with the sewer grant, the Town Board

*Cf. App. Br. 39. Both Judge Oakes and Judge Gurfein accepted without question the notion advanced by appellants that the instant project was intimately related to the development of fair housing under Title VIII, a conclusion which we do not accept in view of the facts at bar.

of New Castle authorized the Supervisor George F. Oettinger to execute and file "an assurance of compliance with the Department regulations under Title VI of the Civil Rights Act of 1964" (50a; Plf. Ex. 1, Doc. 15). This assurance of compliance was executed on April 26, 1972 (Plf. Ex. 1, Doc. 13; 76a-77a). Under its terms, King-Greeley, among other things, agreed:

> "[I]t will comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Housing and Urban Development (24 CFR, Subtitle A, Part 1) issued pursuant to that Title, to the end that, in accordance with VI of the Act and the Regulation no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program for which the applicant receives Federal financial assistance from the Department of Housing and Urban Development, and HEREBY GIVES ASSURANCE that it will immediately take any measures necessary to effectuate this agreement." (Emphasis added).

King-Greeley has fully complied with its agreement, and plaintiffs make no claim that use and benefit of the proposed sewer system will be withheld from King-Greeley residents on some discriminatory basis.

Plaintiffs on this appeal incorrectly seek to reach the merits of their claims, arguing, among other things, that had the grant procedure been properly followed,

a grant to the Town would not have been made (App. Br. 9-11). Such a conclusion is reached on the basis of incorrect assumptions and irrelevant underlying data. Contrary to appellants, HUD procedures do in fact take into account factors relating to the applicability of the project to minority and low income persons. Among the criteria considered are the capacity for future growth, financial need, and accessibility to persons of low and middle income (226a-228a).

Secondly, appellants make a point of the different results reached during the first rating (evidenced by the "reconstructed" rating sheet) and the de novo rating. (App. Br. 9-11) The major difference between the de novo rating and the original ratings resulted from incorrect data used in the de novo rating. Financial need in the de novo rating was based on the median family income for Town taken from the 1970 census (175a). Such data for Town have no relevancy to King-Greeley which was the applicant for the HUD grant. It is clear that despite the absence of exact income figures for King-Greeley, the median income is considerably lower than that of the entire Town (51a).*

*Appellant's incorrect factual argument is based on a deposition taken by appellants prior to Town's intervention. Such testimony is inherently unreliable since it has not been tested in the crucible of cross-examination or evidentiary hearing. The admissibility and creditibility of such testimony was not determined by the District Court and should not be considered on this appeal.

D. Preservation of Turner Swamp

Turner Swamp (and the adjacent Kipp Street School property), consisting of approximately 38 acres, lies approximately one mile from the hamlet of Chappaqua and is surrounded by residential development. It is largely a bog or marsh area which drains approximately 250 surrounding acres. In addition to its drainage function, it also serves as a natural wildlife preserve. The purposes to be served by the proposed project are public health and safety as well as environmental, recreational and educational (52a).

Plaintiffs do not claim that the Town is developing the Turner Swamp as a recreational and park facility in order to prevent the construction of multi-family housing on the site. Indeed, it is clear that the proposed park project has nothing whatever to do with housing (52a-53a). Turner Swamp property is basically unsuitable for development because of its boggy, marshy characteristics and because development would seriously increase drainage problems in the hamlet of Chappaqua creating possible dangers of flooding (53a).

Environmental and educational considerations sharply favor preservation of Turner Swamp. Prior to its acquisition by the Town, it was one of the last remaining wetlands under private ownership and its acquisition by the Town was vital to the Town's future development insofar as wildlife

and recreation purposes are concerned. The area is highly suitable for use as a managed wildlife area where a varied wildlife population already exists and needs only be encouraged. It is also contemplated that the area be used by school children for nature studies (53a).

In connection with its application for a federal grant, the Town executed an Assurance of Compliance on June 22, 1972 (77a). Under its terms, the Town obligated itself as follows:

> "Town of New Castle (hereinafter called 'Applicant-Recipient') HEREBY AGREES THAT IT will comply with Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to the Department of Interior Regulation pursuant to that Title, to the end that, in accordance with Title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under any program or activity for which the Applicant-Recipient receives financial assistance from the Bureau of Outdoor Recreation and Hereby Gives Assurance That It will immediately take any measures to effectuate this agreement." (53a, 77a)

E. Background of Appellants' Complaint

Various persons associated with Suburban Action, the real plaintiff in this action, have from time to time expressed opposition to the existing zoning ordinance in the Town and indicated that a court action challenging the

zoning was being considered. No such action was commenced by Suburban Action (56a).

By letter dated January 19, 1973, Suburban Action wrote a seven-page letter of complaint to HUD and to Tri-State Regional Planning Commission outlining their legal theories and objections to the federal grants. Both HUD and BOR reviewed the Suburban Action's objections and concluded again that the grants were legally proper and desirable. These conclusions were communicated to Suburban Action by letters from HUD and BOR (Plf. Ex. 1, Docs. 12 and 39). S. William Green, Regional Administrator of HUD, by letter dated May 9, 1973, stated:

> "[T]here is no legal basis for cancellation of the contract with the Sewer District." (Doc. 39, supra).

James G. Watt, Director of BOR, likewise concluded that the grants were proper and in compliance with applicable statutes and regulations. In addition, he observed:

> "...we feel that the project contributes to balanced patterns of settlement by providing open space, and its 'services', i.e. outdoor recreation, are of benefit not only to all persons who wish to take advantage of them, but, more importantly, to the human environment generally." (Doc. 12, supra).

Suburban Action did not send its letter to the Town, although a copy subsequently came into possession of then Supervisor George F. Oettinger. Supervisor Oettinger responded point by point to Suburban Action's letter in his own letter dated January 22, 1973 (78a-81a; 57a). Supervisor Oettinger's letter concludes:

> "If Mr. Gold and Mr. Davidoff [of Suburban Action] are sincere, they should mount a legal attack against our Zoning Ordinance." (81a).

This invitation to challenge Town's zoning ordinance was not accepted. Instead, Suburban Action commenced the instant action without even joining Town and King-Greeley as parties defendant with the apparent hope that unsupported cries of discrminatory zoning practices rather than hard facts and legal analysis would cause the federal appellees to reconsider and cut off federal funds to two projects which have little if anything to do with housing and concededly do not embody discriminatory or exclusionary practices (58a).

F. The Town's Zoning

The complaint before this Court does not challenge the legal validity of the Town's zoning ordinance and there is absolutely nothing in the record to establish that the zoning ordinance is arbitrary, unreasonable and beyond the police power of the Town.

The zoning map of the Town (70a) shows the permitted uses of various areas of the Town. Contrary to appellants this includes areas zoned for residential uses on lots ranging in size from 1/4 acre to 2 acres, various business uses, and planned and general industrial uses. In addition, particularly with respect to King-Greeley, construction prior to the enactment of the zoning ordinace in 1930 has resulted in the existence of homes on smaller size lots and also some multi-family housing (59a).

The current 1971 zoning ordinance, as reflected in the zoning map before this Court (70a), was enacted only after careful consideration. A Town Plan of Development was prepared by independent planning consultants. This Town plan was adopted after numerous public meetings and served as a guideline for the current 1971 zoning ordinance and official zoning map (59a).

In addition, the Town has given careful consideration to the need for multi-family housing. A multi-family housing study was prepared by the Town's Planning Board and independent planning consultants. One result of this study was that a survey among persons employed by Reader's Digest, a major employer in the Town showed that only 20 persons (17% of those answering) stated they were non-residents who would like to move to the Town. There is little industry in the

Town which would attract in-migration of low-paid workers. The multi-family housing study is presently being continued so that additional units of multi-family housing can be provided if deemed necessary (59a-61a).*

In short, the current zoning ordinance was duly adopted by the locality only after study and analysis and with knowledge and familiarity of the needs and desires of the community. The need and suitability of adding units of multi-family housing is being given active consideration by the residents of the Town and its elected officials (61a). This, however, is not a proper subject for federal jurisdiction. As Town Supervisor Burns stated:

> "I respectfully submit, however, that the zoning of property in the Town and the land uses to be permitted on such property are a matter for the elected legislative body, i.e, the Town Board of the Town of New Castle, to determine. This federal court should not inject itself into a local zoning dispute particularly

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*The facts concerning plans of the Urban Development Corporation to construct multi-family housing in Town are set forth in detail in Mr. Burns' affidavit (54a-56a). While these facts are in no way relevant to the case at bar or to appellants' lack of standing, they were submitted to rebut the baseless arguements and insinuations advanced by appellants below and repeated on this appeal. It is sufficient to note that U.D.C.'s controversial authority to override local zoning and building codes was removed by the State Legislature, and that following its initial proposal U.D.C. took no steps to implement its proposal for Town, including the holding of the required statutory hearings and other proceedings (56a). There is no record support for any finding that Town "thwarted the New York State Urban Development Corporation's attempt to construct within its borders a small 100-unit low-cost housing facility" (See Slip Op. 3890).

in the instant case where the complaint does not seek a judicial determination of the invalidity of the zoning ordinance or even name the Town as a party defendant, and, concededly plaintiffs are neither property owners in the Town who have been injured by the zoning ordinance or individuals who have in some direct and immediate manner sustained specific injury." (61a-62a).

POINT I

APPELLANTS FAIL TO DEMONSTRATE ANY INJURY IN FACT RESULTING FROM THE CHALLENGED FEDERAL SEWER AND WETLANDS GRANTS AT BAR; THE COMPLAINT BELOW WAS CORRECTLY DISMISSED FOR LACK OF JURISDICTION

A. Judge Oakes was incorrect in holding that the "injury-in-fact" requirement is met solely because plaintiffs have a general interest in the enforcement of an alleged statutory duty.

The growing number of so-called "public interest" lawsuits challenging the legality of governmental conduct has recently caused the United States Supreme Court and this Court as well to inquire closely into the standing of particular plaintiffs to litigate their claims and to review again the requirements of standing and the broader concept of a case or controversy.

The requirement of standing goes to the authority of Federal Courts to hear claims brought before them. Where plaintiff does not have standing, the court is without jurisdiction to hear the case and dismissal is required without consideration of the merits of the claim, e.g., Warth v. Seldin, ___ U.S. ___, 45 L. Ed. 2d 343 (1975); United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); California Bankers Association

v. Schultz, 416 U.S. 21, (1974); Sierra Club v. Morton, 405 U.S. 727 (1972); Laird v. Tatum, 408 U.S. 1 (1972); Association of Data Processing Service v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968). Standing is a constitutional issue, since Article III requires the existence of a case or controversy to assure, among other things, that litigated matters are presented by persons with the necessary adverseness of interest.

As Mr. Justice White stated in directing dismissal of the O'Shea complaint:

> "The complaint failed to satisfy the threshold requirement imposed by Article III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy. Flast v. Cohen, 392 U.S. 83, 94-101, (1968); Jenkins v. McKeithen, 395 U.S. 411, 421-425, (1969) (opinion of Marshall, J.). Plaintiffs in the federal court 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204 (1962). Nor is the principle different where statutory issues are raised. Cf., United States v. SCRAP, 412 U.S. 669, 687 (1973)." 414 U.S. at 493-94.

Recently, the United States Supreme Court stated in Warth:

> "The rules of standing, whether as aspects of the Art. III case or controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinations of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. 45 L. Ed. 2d at 366.

In addition to the constitutional mandate of standing, the United States Supreme Court has recognized other limits on the class of persons who may invoke the court's decisional and remedial powers. Warth v. Seldin, ___ U.S. ___, 45 L. Ed. 2d 343, 355 (1975).

First, a "generalized grievance" shared in substantially equal measure by all or a large number of citizens does not normally warrant exercise of jurisdiction. Schlesinger v. Reservists to Stop the War, supra; United States v. Richardson, supra; Ex parte Levitt, 302 U.S. 633 (1937).

Second, even when a plaintiff has alleged injury sufficient to meet Article III's case or controversy requirement, the plaintiff generally must assert his own legal rights and interests not those of third parties. E.g., Tileston v.

Ullman, 318 U.S. 44 (1943); Laird v. Tatum, 408 U.S. 1, 13 n. 7 (1972); see United States v. Raines, 362 U.S. 17 (1960); Barrows v. Jackson, 346 U.S. 249 (1953).

As correctly recognized by the District Court, the proper test for determining whether a plaintiff has standing is a two pronged test: the plaintiff must be both "arguably within the zone of interest" of the statutory or constitutional provisions he claims has been violated and must suffer "injury in fact". Association of Data Processing Service v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Warth v. Seldin, supra.

Injury in fact must be personal to the plaintiff and be real and immediate. In O'Shea v. Littleton, supra, the Supreme Court held:

> "Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged statute or official conduct. Massachusetts v. Mellon 262 U.S. 447, 488 (1923). The injury or threat of injury must be both 'real and immediate', not 'conjectural' or 'hypothetical'. Golden v. Zwickler, 394 U.S. 103, 109-110 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947)." 414 U.S. at 494.

The injury in fact test requires more than an injury to a cognizable interest, it requires the party seeking

review be himself among the injured. E.g. Sierra Club v. Morton, supra; Laird v. Tatum, 408 U.S. 1, 13 n. 7 (1972).

Notwithstanding these well established criteria of "injury-in-fact", appellants argue that as black and Spanish speaking citizens residing in areas of racial imbalance, they have a personal stake in the enforcement of Title VIII and therefore have standing to challenge the federal grants at bar and enjoin payment to Town (App. Br. 28). Judge Oakes accepted this view of standing. He states:

> "We do not do so [find injury-in-fact] on the basis that they have a sufficient connection with the community to or for the benefit of which the grants are made. We do so do purely and simply because one important mehtod of the congressional policy set forth in Title VIII is by the agencies' administration grants related either to housing or urban development." (Slip. Op. at 3899) (emphasis added).

In effect, appellants and Judge Oakes have eliminated injury in fact as a prerequisite for standing and reduced the two pronged test of standing to one. Having determined that appellants are within the "zone of interest" sought to be protected by the statute, Judge Oakes makes the political socio-economic decision that a cogent policy reason exists for permitting plaintiffs to litigate their claim absent actual injury resulting from the specific challenged acts. This decision directly conflicts with numerous decisions of the United States Supreme Court. E.g., United States v. Richardson,

supra; Schlesinger v. Reservists to Stop the War, supra; O'Shea v. Littleton, supra; Sierra Club v. Morton, supra; Laird v. Tatum, supra; Association of Data Processing Service v. Camp; Warth v. Seldin, supra.

It is manifest, and Judge Oakes expressly concedes, that appellants have not sustained injury in fact, as that concept has been formulated in prior decisions.

Appellants have stipulated that they do not reside and have not sought housing in the Town; that the federal funds for the grants at bar were not diverted from their own communities; and that the sewers and park projects being funded are being administered in a non-discriminatory manner. The only injury appellants cite is their present residence in alleged segregated substandard housing (App. Br., pp. 22, 24-25).* But, as Judge Pollack stated in his opinion below, "[T]hat 'injury' [plaintiff's segregated substandard housing] is in no way linked to the particular grants complained of herein. Nor would restraining deliverance of the federal funds in any way alleviate their situation" (102a).

*We note in passing that this argument is not supported by the record especially with respect to the one plaintiff who submitted to deposition, and testified her living quarters were "fine" and her neighbors were persons of "all races" (65a).

The record is barren and there is simply no demonstrable causation between the undesirable conditions Judge Oakes perceives in the nation's ghettoized housing patterns (Slip Op. 3839), and the challenged grants to the Town. Appellants have therefore failed to present an Article III case or controversy. Cf. Warth v. Seldin, 45 L. Ed. 2d 343, 357-58 (1975).

That appellants' lawsuit may be characterized as a "public interest" suit does not relieve them from the burden of meeting the injury in fact test. See e.g., Sierra Club v. Morton, supra. Nor do appellants have standing absent injury in fact simply because their claim is alleged to be within the ambit of the Civil Rights Acts. See O'Shea v. Littleton, supra.

In urging reversal of the order of dismissal below, appellants seek to avoid the thrust of the Supreme Court's decisions in Warth, Richardson, Schlesinger and O'Shea dealing with the issue of standing by arguing that each of those cases involve constitutional challenges rather than actions brought to enforce a statutory right (App. Br. p. 28-32). Thus, appellants argue, erroneously we submit, that the question of standing is different when Congress has created a right by statute, and that injury in fact is not required where the action seeks enforcement of a statute.

Judge Oakes accepted appellants' argument. He stated:

> ". . . [W]here Congress has created a duty Congress can declare that anyone aggrieved can enforce the corrolary right. Again, standing is conceptually broader where a statutory duty has been violated than when prosecutorial or judicial discretion is challenged, since there is no statute conferring review of such actions."
> (Slip Op. 3899)

Judge Oakes' error lies in assuming that a "broader" concept of standing is the equivalent of dispensing with the injury in fact requirement.

The Supreme Court has long recognized that Congress by statute may broaden the concept of injury and create rights which would not exist but for such statute. But it has made clear that "broadening the categories of injury that may be alleged in support of standing is different from abandoning the requirement that the party seeking review must himself have suffered an injury". Sierra Club v. Morton, 405 U.S. 727, 738 (1972). See also O'Shea v. Littleton, supra at 493-94. "[O]ne who has no interest of his own at stake always lacks standing." (Citing Davis, Administrative Law 428-29 (3d. ed. 1972)). Linda R.S. v. Richard D., 410 U.S. 614, 617 n. 3 (1973). The constitutional requirements of Article III, which include injury in fact, are not eliminated when a

plaintiff predicates his claim on a federal statute. As Justice Powell held in Warth:

> "Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. E.g., United States v. SCRAP, 412 U.S. 669 (1973)." 45 L. Ed. 2d at 356.

Contrary to appellants, Section 10 of the Administrative Procedure Act, 5 U.S.C. 702, does not compel the conclusion that appellants absent injury in fact have standing. Section 702 itself embodies the requirement that a plaintiff proceeding thereunder be "adversely affected or aggrieved" by the challenged administrative action. The Supreme Court has interpreted standing under the Administrative Procedure Act to require compliance with the accepted two-prong standing test. Sierra Club v. Morton, supra; United States v. SCRAP, supra; Association of Data Processing Service v. Camp, supra; Barlow v. Collins, supra.

As the Supreme Court held in Sierra Club v. Morton, supra at 733: "[P]ersons had standing to obtain judicial review of federal agency action under §10 of the A.P.A. [5 U.S.C. 702] where they had alleged that the challenged action had

caused them 'injury in fact'" and were within the zone of interest. Thus, Section 702 does not in any way dispense with the injury in fact requirement. To the extent that Judge Gurfein's concurring opinion holds otherwise, it is respectfully submitted to be in error.

Nor does anything in Title VIII, upon which appellants base their claim, support the notion that injury in fact is dispensed with when an action is brought to enforce an alleged duty under that statute. Under Title VIII, a right of action is granted to a "person aggrieved", a term defined in the statute as "any person who claims to have been injured by a discriminatory housing practice." 42 U.S.C. 3610. Title VIII itself therefore expressly retains the conventional requirement that a plaintiff cannot bring a suit unless he has sustained a real and immediate injury as a result of the challenged action.

Accordingly, there is no sound basis for Judge Oakes' elimination of the injury in fact prerequisite in testing appellants' standing at bar. Adoption of Judge Oakes' novel approach means that a federal court need no longer determine at the outset whether a plaintiff has suffered a real immediate personal injury as a result of a challenged administrative action. Instead, such determination would now be limited to the question of whether the suit was brought to

enforce a policy of Congress as perceived by the judge who happened to be hearing the case. Such procedure not only flies in the face of prior controlling decisions but, if allowed to stand, would violate important public policy and constitutional concepts. Expansion of judicial power by relaxation of standing requirements, particularly when the relief sought produces a confrontation with coordinate branches of government, is a matter which has elicited expressions of concern both in the Supreme Court and in this Court as well (Slip. Op. 3912-13). As noted by Judge Moore at bar:

> "It would be in the Justice's opinion [Justice Powell concurring in United States v. Richardson, 418 U.S. 166 (1974)], as it is in mine, highly inconsistent 'if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative and in large measure, insulated, judicial branch.' (p. 188) (footnote omitted). 'Unrestricted standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government.' (p. 189)." Slip. Op. 3913.

Disregard of the accepted prerequisites of standing as urged by appellants at bar, and accepted by Judge Oakes, would, to paraphrase Judge Moore, distort the traditional relationship between the Judicial and other branches of government and subject the Judiciary to the charge of governing by injunction (Slip. Op. 3912).

It violates our concept of appropriate judicial function to say nothing of Article III, to permit the federal courts to be used for vindication of a particular political and socio-economic viewpoint, or to use Judge Pollack's term, "value preferences".* As Judge Moore correctly noted:

> "*** what would be the result of success for plaintiffs in this litigation? Primarily it would be to prevent their fellow-citizens who are as much in need of sewers as they claim to be in need of housing from having sanitary sewers and a wildlife sanctuary or park, thus preserving fast-shrinking open spaces. But a far more dangerous result would be the establishment of a principal that the judgment and discretion exercised by the executive and legislative branches of government can be examined and questioned (or even overturned) by any citizen, aided by the judiciary to determine whether the decision (such as HUD's and BOR's here) was to their liking." (Slip. Op. 3909).

The Supreme Court's decision in Warth v. Seldin, supra, rendered subsequent to the original panel's decision at bar reaffirms its prior decisions and the established prerequisites of standing. That decision mandates affirmance of the District Court's order of dismissal below.

In Warth, the Supreme Court affirmed the prior decision of this Court affirming the dismissal for lack of

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*It is undisputed that nothing more than competing value preferences are involved at bar (see testimony of appellant Evans quoted above at p. 15)

standing of a complaint of blacks and Puerto Ricans of low income who alleged that Penfield's zoning laws effectually excluded them from residence. As in the instant case, none of the plaintiffs claimed that anyone refused to sell or lease housing or property to them. Like appellants at bar, the Warth plaintiffs conceded they could not afford any existing housing in Penfield, and did not claim any interest in land within the town or any connection with any plan to construct housing therein. The Supreme Court held plaintiffs must affirmatively demonstrate that their alleged injury, i.e., residing in substandard housing, was caused by Penfield's zoning practices in order to have standing to sue. 45 L. Ed. 2d at 357-58.

In finding "the record devoid of the necessary allegations" required to establish standing, Justice Powell stated:

> "Petitioner must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested the asserted inability of petitioners will be removed." (citation omitted).
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> * * *
>
> ". . . As the Court of Appeals noted, none of these petitioners has a present interest in any Penfield property; none

> is himself subject to the ordinances' strictures; and none has ever been denied a variance or permit by respondent officials." (citation omitted).
>
> * * *
>
> ". . . Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary -- that their inability to reside in Penfield is the consquence of the economics of the area housing market, rather than of respondents' assertedly illegal acts. In short, the facts allegedly fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury." 45 L. Ed. 2d at 358-59

Appellants' complaint at bar seeks an order enjoining payment of the federal grants until the Town changes its zoning ordinance (14a-15a). While appellants' challenge of the Town's zoning ordinance at bar is thus oblique rather than direct, the same reasoning which compelled dismissal for lack of standing in Warth is applicable. At bar as in Warth, the appellants lack of interest in the Town is conceded. They have not sought housing in the Town, own any land there, and are not subject to the provisions of the zoning ordinance. In addition, appellants at bar expressly disclaim any interest in the federal funds involved. Thus, as in Warth, they are unable to demonstrate any personal injury resulting from the federal appellees' grant procedures or from the Town's zoning ordinance. As in Warth, the relief requested by appellants, even if granted, will do nothing to ameliorate their alleged

unsatisfactory housing conditions. It is appellant's financial situation and the economics of the area housing market, not the Town's zoning ordinance or the federal agencies' grants which have caused the appellants' alleged injury.* Allegations of injury based on such facts were held insufficient by Justice Powell in Warth. 45 L. Ed. 2d at 358-60. The Supreme Court thus expressly agreed with Judge Hays writing for a unanimous panel of this Court that the Warth appellants' claimed injury was attributable solely to the fact they could not afford existing housing within the town. Warth supra 495 F.2d at 1191.

As in Warth, the claims of appellants at bar are at best conjectural and speculative; none of the named appellants has suffered from any of the specific, overt acts alleged to have been done by the appellees. Cf. Warth v. Seldin, 495 F.2d 1187, 1193 (2d Cir. 1974) and 45 L. Ed. 2d. 343, 358 (1975). Accordingly, appellants will realize no personal benefit even if they obtain the relief demanded in their complaint. Enjoining payment of the instant sewer and park grants clearly will not ameliorate their housing conditions and evidences their lack of "a personal stake" in this action. Judge Hays' observation in Warth at 1192 is

*In fact, given the small amount of funds involved in the present litigation, it is difficult to see how enjoining the grants could have any effect on appellant's situation. As Judge Moore indicated: "Equally illogical is it to say that the allocation of funds to New Castle 'contributes to the perpetuation of [plaintiff's] living patterns in the New York Metropolitan area. $358,000 and $57,500 would scarcely suffice for a low cost housing project." (Slip Op. at 3916).

pertinent:

> "Appellants lack such a personal stake. The essence of their complaint is that zoning practices of the appellees are unfair. However true that charge may be, absent a showing that appellants themselves have suffered from these practices they lack standing to challenge them. Their dispute with appellees reflects primarily a political disgruntlement. They indicate no benefit which a judgment favorable to them would produce."

Accord: Warth v. Seldin, 45 L. Ed. 2d 343, 359-60.

B. Appellants'misplaced reliance on the Supreme Court's decisions in SCRAP, Trafficante and Richardson

Appellants also seek to justify their claim of standing on the basis of United States v. SCRAP, supra, and Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 705 (1972). Such reliance is misplaced. In SCRAP, the injury in question resulted from an omission of a statutory duty which the agency was required to perform under NEPA, 42 U.S.C. §4332 (2) (c). As appellants argue in their brief on rehearing and as Judge Oakes stated in his opinion, "As in SCRAP we have plaintiffs injured in fact by administrative inaction." (Slip op. at 3898; Appl. Br., 26). But what is completely overlooked in this argument is that the Court in SCRAP specifically reaffirmed the principle that injury from administrative inaction was causing a general injury was not sufficient to establish injury in fact. Instead, the Supreme Court was very careful to point out that plaintiffs' complaint alleged that plaintiffs "used the forests, streams, mountains and other resources" affected by the administrative inaction "for camping, hiking, fishing and sightseeing" and could not "say on these pleadings" that injury in fact could not be proven. 412 U.S. at 685. The facts of SCRAP are thus clearly distinguishable from the facts before this Court in the present case. No such specific allegations of injury from the administrative action are made in the present case. Indeed, appellants at

bar expressly disclaim by written stipulation any specific, direct and personal injury stemming from the challenged grants.

SCRAP was decided shortly after Sierra Club v. Morton, supra, a decision which expressly reaffirmed the established principle that a plaintiff's standing depended upon the ability to demonstrate personal injury. The Sierra Club, an organization with a general interest in environmental problems attempted to challenge the action of the United States Forest Service in converting Mineral King Valley from its natural state to a recreation area. The claim, there as here, was that a Federal agency violated its statutory duty. The Supreme Court in Sierra Club although recognizing that the injury involved was cognizable, held that the plaintiffs lacked standing because they had not suffered personal injury from the federal agency actions.

As the Court in SCRAP said in reference to Sierra Club:

> "In Sierra Club, though, we went on to stress the importance of demonstrating that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders. No such specific allegation was alleged in Sierra Club... . Here, by contrast, the

> appellees claimed that the specific and allegedly illegal actions of the Commission would directly harm them in their use of the natural resources of the Washington area." (p. 687).

Plaintiffs in the present case, like those in Sierra Club fail to allege specific and personal injury sufficient to give them a personal stake in the outcome of the litigation. SCRAP, rather than being authority for finding standing in the present case as appellants claim, is in fact authority for dismissing this suit for lack of standing. Appellants are doing no more than using the judicial process as "a vehicle for the vindication of the value interests of concerned bystanders." 412 U.S. at 687.

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), likewise does not support appellants' position. In Trafficante, the plaintiffs were tenants who actually resided in the apartment complex, which was the subject of their complaint. They sued their landlord alleging that they were injured by living in a "white ghetto". In other words they claimed an actual injury in fact occasioned by the acts of the defendant landlord in administering the apartment complex in a discriminatory manner. In reiterating the injury in fact test, Mr. Justice Douglas found:

> "Individual injury or injury in fact to petitioners, the ingredient found missing in Sierra Club v. Morton, is alleged here. Id. at 209

Appellants also seek to utilize Justice Powell's concurring opinion in United States v. Richardson, 418 U.S. 166, 196 n. 18 (1974) to support their argument that Congress can confer standing absent injured in fact. (App. Br. 29).

Whatever solace appellants may derive from quoting this footnote out of context cannot disguise the point that Mr. Justice Powell specifically reaffirmed in his Richardson concurrence the requirement of injury in fact. He cautioned:

> "All standing cases, even the most recent ones, include references to the need for particularized injury or similar language. None of them as yet has equated the interest of a taxpayer or citizen, suing in that status alone, with the particularized interest that standing doctrine has traditionally demanded. To take that step, it appears to me would render the requirement of direct or immediate injury meaningless and would reduce the Court's consistent insistence on such an injury to mere talk." 418 U.S. at 194 n. 16.

In addition, it must not be overlooked that as discussed above, the statutes upon which appellants at bar predicate their claim, by their own terms require injury in fact.

It is respectfully submitted that the pertinent

Supreme Court decisions discussed by the District Court and in three opinions of the original panel mandate but one result -- dismissal of appellants' complaint for lack of standing.*

*The lower court decisions relied on by appellants similarly do not aid them. Appellants' suggestion, for example, that the District of Columbia Circuit in Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) granted substantive relief to the plaintiffs despite their lack of a personal stake in the litigation is not supported by the Court's decision. Given the fact that the cross-motions for summary judgment were made in the District Court and the facts thoroughly explored, it is reasonable to assume that plaintiff's standing was manifest and therefore not challenged by defendants or considered by the Court. The recent decision of the District Court in Accion Hispana, Inc. v. Town of New Castle Civil No. B-312 (D.C. Conn. August 18, 1975) is not determinative. The District Court was bound to follow the decision of the original panel at bar.

POINT II

IF CONTRARY TO THE ARGUMENTS ADVANCED IN POINT I, THE FULL COURT AGREES WITH JUDGE GURFEIN'S CONCURRENCE, THE DISTRICT COURT'S ORDER OF DISMISSAL SHOULD BE AFFIRMED TO THE EXTENT IT HELD THAT APPELLANTS LACK STANDING TO ENJOIN PAYMENT OF THE GRANTS

For the reasons discussed in Point I, the Town respectfully submits that Judge Gurfein erred in concluding that on the undisputed record facts appellants had limited standing to challenge the administrative actions of the federal appellees under 5 U.S.C. 702. Should the full Court, notwithstanding appellees' arguments, agree with Judge Gurfein, it would be appropriate at this time to face the issue of appellants' lack of standing to obtain injunctive relief.*

Judge Gurfein correctly perceived the conceptual difficulty of permitting appellants to obtain an injunction restraining payment of the Town's grants when it is clear they have not sustained any actual or threatened injury by reason of such grants -- an essential element of injunctive relief. Judge Gurfein held:

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*It should be noted that appellants' claim to enjoin the grants is moot. The park project has been completed and the BOR grant has been paid in full. The sewer project likewise has been virtually completed, and is in use. The HUD grant has been paid, except for a small balance being withheld pending certification of completion of the project. Dismissal of the complaint is warranted. DeFunis v. Odegaard, 416 U.S. 312, 218 (1974).

> "I would not hold that the plaintiffs necessarily have standing to seek injunctive relief against the Secretary of HUD and his assistants to restrain the grant of federal funds, for that involves the preliminary question of whether a determination by HUD to grant funds to New Castle is subject to judicial review and, if so, at whose instance, a matter we need not decide if we simply reverse the summary judgment." (Slip Op. 3917)

He continued:

> "In my view, a person may be an 'aggrieved person' within the meaning of the Administrative Procedure Act, 5 U.S.C. §702, to remedy administrative inaction without necessarily having standing for other relief. He may be aggrieved by HUD's failure to perform its statutory duty of inquiry, which is for his class benefit. He may not have been injured in fact sufficiently to coerce the executive agency to withhold funds." (Slip Op. 3917, 3919-20).

Under Judge Gurfein's view, a federal court would have jurisdiction to oversee an agency's activities, but not possess jurisdiction to enjoin conduct found to violate the statutory mandate. The effect of this approach, we submit, is to sanction advisory opinions, a concept alien to our system of government. See Muskrat v. United States, 219 U.S. 346 (1911). As the Supreme Court in Sierra Club v. Morton stated:

> "Congress may not confer jurisdiction of Art. III federal courts to render advisory opinions. . . because suits of this character are inconsistent with the judicial function under Art. II." Id. 732, n.3.

Should the full Court allow appellants' standing under the approach suggested by Judge Gurfein, with respect to the federal appellees* on reargument the full Court is urged to take the step Judge Gurfein recognized was proper, but refused to take -- that is, to hold explicitly that the appellants do not have standing to obtain an injunction restraining the grants to Town of New Castle. The record pertinent case authorities, including the black letter law of injunctions, fully support such a determination. Moreover, such decision at this time would substantially expedite and simplify any further proceedings in this District Court in the interest of judicial economy.

*Judge Gurfein's expressed desire to "allow standing to these plaintiffs so that they may raise in a judicial context, what the obligations of HUD are and whether HUD has met them" (Slip Op. 3919) may well be academic. A newly enacted statute has eliminated the prior HUD categorical grants of the type present at bar and replaced them with a system of block grants, including detailed procedures for the award of such grants. 42 U.S.C. §5301 et seq. Accordingly, whatever change in procedure appellants seek to impose upon the federal appellees with respect to the HUD grant at bar will have no bearing on future grant applications.

POINT III

APPELLANTS' COMPLAINT FAILS TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED

A. The Complaint Is Insufficient To Challenge Town's Zoning Ordinance

The background of this lawsuit and the relief sought by the appellants make it clear that their complaint is really directed at the Town's zoning policy and not the federal grants to the Town. The motion of Town and King-Greeley before the District Court also sought dismissal of the complaint pursuant to Rule 12(b)(6) Fed. R. Civ. Pro. for failure to state a claim upon which relief may be granted. In view of the District Court's dismissal for lack of subject matter jurisdiction, it did not reach this branch of the motion to dismiss.*

However, it is clear that the complaint is deficient in a number of major respects. First, as set forth most recently by the Supreme Court in Warth v. Seldin, supra, appellant cannot allege a legally sufficient claim challenging the zoning policies of the Town. Appellant's complaint fails to allege that plaintiffs are residents of Town and/or

*Both Judge Oakes and Judge Gurfein made clear they did not believe it necessary to reach this issue in view of the reversal of the District Court on the standing issue.

King-Greeley or possess any interest in land or other property or any future construction located in Town. Indeed, appellants have stipulated that they did not seek housing in Town. Such an interest or its equivalent is essential even where a plaintiff seeks to challenge the validity of a zoning ordinance on civil rights grounds. Warth v. Seldin, supra and cases therein cited. This has also long been the rule in zoning cases decided in the state courts.*

Secondly, the Town's zoning ordinance is not unconstitutional, not discriminatory and is within the reasonable exercise of the community's police power. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In upholding the validity of a zoning ordinance restricting land use to one-family dwellings, excluding lodging houses, boarding houses or multiple dwelling houses, Mr. Justice Douglas observed:

*Under state law, for example, a general interest in enforcing a zoning ordinance does not confer upon a plaintiff a sufficient status to invoke the judicial power, the Courts holding there must be special injury or damage to one's personal or property rights as distinguished from being merely the champion of a cause. Blumberg v. Hill, 119 N.Y.S. 2d 855 (Sup. Ct., Westchester Co. 1953); Hattem v. Silver, 19 Misc. 1091, 190 N.Y.S. 2d 752 (Sup. Ct. Nassau Co. 1959); Property Owners Association v. Board of Zoning Appeals of Garden City, 2 Misc. 2d 309, 123 N.Y.S. 2d 716 (Sup. Ct. Nassau Co. 1953). See also, Brechner v. Incorporated Village of Lake Success, 25 Misc. 2d 920, 208 N.Y.S. 2d 365 (Sup. Ct., Nassau Co. 1960), aff'd 14 A.D. 2d 564, 218 N.Y.S. 2d 1017 (2d Dept. 1961), appeal dismissed 11 N.Y. 2d 929 (1962); Rice v. Van Vranken, 225 App. Div. 179, 232 N.Y. Supp. 506 (3rd Dept. 1929), aff'd 255 N.Y. 541 (1930).

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in land use project addressed to family needs. This goal is a permissible one within Berman v. Parker, [348 U.S. 26]. The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clear air makes the area a sanctuary for people." 416 U.S. at 9.

Following the Supreme Court's decision in Belle Terre, the Ninth Circuit dealt with an "exclusionary zoning" ordinance in Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974). Appellants, low-income Mexican Americans, challenged a zoning ordinance which provided for one family residences on lots of not less than one acre. The appellants charged that the zoning provision "discriminated against Mexican-Americans and the poor" and denied them equal protection under the law. In upholding the validity of the zoning ordinance that Court stated:

> "...the town need only show that the ordinance bears a rational relationship to a legitimate governmental interest... Here the ordinance is rationally related to preserving the town's rural environment. [citation omitted] The ordinance does not violate the equal protection clause." 503 F.2d at 254.

Recently, the Ninth Circuit Court of Appeals again had an exclusionary zoning statute before it in Construction Industry Ass'n of Sonoma County v. The City of Petaluma, No. 74-2100 (August 13, 1975). The plan in Petaluma, specifically and deliberately designed to correct the imbalance between single family and multi-family dwellings and retard the accelerating growth of Petaluma, limited to 500 the number of new housing units per year which could be built as part of development units (projects involving 5 or more units).

Two landowners in Petaluma and a construction industry association commenced suit claiming that the Petaluma Plan was unconstitutional. The Court of Appeals framed the issue before it as follows:

> "...in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose. We must determine further whether the exclusion bears any rational relation ship to a legitimate state interest. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation. The reasonableness, not the wisdom, of the Petaluma Plan is at issue in the suit." Slip Op. p. 11.

The Court in Petaluma correctly recognized the limited role of federal courts with respect to local zoning ordinances. It stated:

> "If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or the entire state, it is the state legislature's and not the federal court's role to intervene and adjust the system. . . . [T]he federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests." Slip Op. at 15.

In upholding the validity of the zoning ordinance, the Court expressly relied on the decision in Belle Terre and Los Altos Hills. It held:

> "We conclude that... the concept of public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population and to grow at an orderly and deliberate pace." Slip Op. 15-16.

Thus, it is clear that the Supreme Court and other circuit courts have correctly viewed zoning as a primarily local concern not warranting federal juridical interference absent exceptional circumstances.

It is equally clear from the record at bar that the Town has enacted a legal zoning ordinance well within

its police power. There is no allegation, for example, that Town's zoning ordinance was enacted so as to arbitrarily exclude plaintiffs from purchasing or constructing residential housing in the Town. Cf. Kennedy Park Home Assoc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971)(city rezoned parcel to prevent construction of low income housing project); Dailey v. City Of Lawtos, Oklahoma, 425 F.2d 1037 (10th Cir. 1970)(city denied building permit and zoning change to low income housing project).

On the contrary, the current 1971 zoning ordinance was enacted long before the instant dispute arose and only after careful consideration, which included the preparation of a Town Plan by an independent planning consultant. This Town Plan was then adopted by both the Planning Board and the Town Board, after numerous public meetings (59a). In addition, a multi-family housing study has been prepared for the Town, and is being continued (59a-61a). Any charge that the purpose of the Town's zoning ordinance is to keep out low income or non-white families is unfounded.

B. The Governmental Defendants Are Not Under An Affirmative Duty to Consider Town's Zoning Policies With Zoning or Promote Low Income Multi-Family Housing in Town

Notwithstanding the demand for relief to enjoin any federal grants to the Town until the zoning was changed,

appellants argue they are not really challenging the Town's zoning (App. Br. 19). Instead, they claim to be seeking to enforce a "duty" of the governmental defendants under the Civil Rights Act to provide low income multi-family houses. According to appellants, this means that no locality with low density zoning is eligible for a federal sewer or park grant.

Appellants' argument overlooks the principle that governmental agencies have no constitutional or statutory duty to provide low income housing. See Acevedo v. Nassau County, New York, 500 F.2d 1078 (2d Cir., 1974). There is no "constitutional guarantee of access to dwellings of a particular quality." Id. at p. 1081 quoting from Lindsay v. Normet, 405 U.S. 56, 74 (1972). Nor does the Fair Housing Act of 1968, 42 U.S.C. §§3601-31 "impose any duty upon a governmental body to construct or to plan for, approve and promote any housing". Acevedo v. Nassau County, supra at 1082.

In Acevedo, this Court recently had occasion to consider a complaint by low income plaintiffs against a host of federal, state and local governmental bodies that the abandonment of plans to include low income multi-family housing on Mitchell Field was violative of various federal statutes, regulations, agreements and executive orders. In affirming dismissal of the complaint for failure to state a claim, this Court emphatically rejected the notion that the

governmental defendants had an affirmative duty to construct or promote low income multi-family housing.

Nor is there any basis for appellant's contention that Congress intended that the Fair Housing Act of 1968 impose on federal agencies an affirmative duty not to grant funds to otherwise non-discriminatory projects because of a Town's valid zoning. Neither the language of the Fair Housing Act nor the holdings of cases interpreting the act would support such an affirmative duty.

42 U.S.C. §3601 makes it "the policy of the United States. . . to provide for fair housing throughout the United States." 42 U.S.C. §3608(d)(5) imposes a duty on the federal agencies to "administer programs and activities relating to housing and urban development in a manner affirmatively to further such purposes."

The language although it does refer to an affirmative duty, does not refer to a duty of the type alleged by appellants. Furthermore, as noted above federal courts have recognized that zoning is a local concern. See Village of Belle Terre v. Boraas, supra. It is therefore reasonable to assume that if Congress intended the Fair Housing Act of 1968 to affect the traditional role of localities in zoning and land use regulation it would have specifically so

provided. Since it did not, HUD cannot be charged with a duty under the Fair Housing Act to consider Town's zoning policies prior to making a grant to Town.

Nor are there any court decisions interpreting Title VIII which can be interpreted to place such an affirmative duty on a federal agency.

The decision in Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970), which is heavily relied on by appellants, has no connection with an alleged affirmative duty on the part of HUD not to make grants to a municipality with a so-called exclusionary zoning ordinance. The claim of plaintiff in Shannon was that the site chosen for an apartment project in an urban renewal area of Philadelphia would "have the effect of increasing the already high concentration of low income black residents in the . . . Urban Renewal Area." 436 F.2d at 812. The Third Circuit therefore only decided that HUD had an affirmative duty to consider the discriminatory effects of the project itself, not the effects of previous acts (i.e., the zoning ordinance) of a potential recipient of a grant for a non-discriminatory project. The decisions in Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974) and Otero v. New York City Housing Authority, 484 F.2d (2d Cir. 1973) are to the same effect.

C. The proposed Sewer and Park Projects Are Not Discriminatory and the Federal Grants May not Therefore Be Enjoined

All parties are agreed that no one will be denied the use of either the King-Greeley sewer project or the proposed Turner Swamp facilities because of race, color, national origin, or income. (48a, 49a, 50a, 53a, 54a, 56a, 68a and 85a). "[T]he proposed recreational facility will be open to all -- resident and non-resident alike -- regardless of race, color, national origin, income or language" (54a).

Plaintiffs complaint is utterly devoid of material facts to support its conclusion of discriminatory conduct. The testimony of Richard E. Burns, Town Supervisor, directly rebuts appellants' unsupported charges of discrimination recklessly leveled at the Town and at King-Greeley. Thus, Mr. Burns swears that King-Greeley, the applicant for the sewer grant, has no legal power or authority to enact or modify the Town's zoning ordinance (45a); King-Greeley is occupied by many persons of lower and lower middle income (46a); and it contains a large number of older residences, including multi-family housing constructed prior to the enactment of the Town's zoning ordinance (46a, 49a). Mr. Burns testified (49a-50a):

> "There is no policy or plan to exclude any resident or property from use and benefit of the sewer system on the basis of race, creed, religion, income, or other discriminatory basis. The argument made by plaintiffs that the proposed sewer system will adversely inhibit or somehow affect the future construction of multi-family housing in King-Greeley is absolutely wrong. Aside from the fact that there is very little land in King-Greeley available for such construction, the design of the proposed sewer project as noted above [in par. 18] is adequate to service such future construction."

Supervisor Burns notes that King-Greeley executed the required undertaking to not discriminate with respect to the sewer project, and that it has fully complied with its agreements (50a). Moreover, Mr. Burns directly rebuts appellants' insinuation that King-Greeley discriminates against black and Spanish speaking people of low and moderate income. He states:

> "Housing within King-Greeley covers the range of economic cost, but small, older homes inhabited by working class and lower middle class people are predominant. All of the real estate brokers serving the area have been active in, and are pledged to promote open housing for all groups of people. There has been no effort to discriminate in sales or rental of housing in King-Greeley." (49a).

Notwithstanding that plaintiffs' complaint does not directly challenge the legal validity of the Town's zoning ordinance or seek any judicial relief with respect to such zoning and land use practices, Supervisor Burns has forthrightly presented facts underlying the basis of the present zoning ordinance, and the continuing studies

underway with respect to the need and desirability of modifying the Town's zoning ordinance to permit the construction of additional units of multi-family housing (58a-61a). No claim is made by appellants that Town enacted its zoning to obstruct or restrict their efforts to obtain housing. Indeed, appellants expressly disclaim by Stipulation having made any effort to lease or purchase housing in Town (85a).

For purposes of the instant action, Town's duly enacted zoning ordinance must be presumed to be valid. But even assuming arguendo that Town's zoning operates to exclude low-income persons, it is clear that this alone is not a sufficient basis for this Court to enjoin the non-discriminatory projects herein. Gautreaux v. Romney, 457 F.2d 124 7th Cir. 1972.

In Gautreaux v. Romney, supra, the Court held that a federal court cannot enjoin a specific non-discriminatory project because a recipient has been guilty of unlawful discrimination in connection with other projects. In other words, the judicial inquiry into the validity of the federal grants must be conducted on a program-by-program basis even where the recipient had previously been found to have engaged in patently discriminatory conduct, a factor admittedly not present at bar.

In Gautreaux, the Seventh Circuit in a previous decision had held that HUD had violated the due process clause of the Fifth Amendment by its acquiescence in a pre-1969 site selection procedure of the authority. Nevertheless, it reversed an order of the District Court enjoining HUD from making available to the City of Chicago funds for the second period of Model Cities Programs unless the City complied with certain stated conditions. The Seventh Circuit pointed out that there was no evidence "that the Chicago Model Cities Program has been improperly administered or that it is tainted with racial discrimination." Id. at 126. The Court held that the non-discriminatory program could not be enjoined.

According to the Court:

> "Intervenor-appellants well state the question before us to be: 'But here one party (HUD) had been ordered to stop financing a program, Model Cities, which is free from taint, in order to force a non-party (City of Chicago) to comply with an order. . .'.
>
> * * *
>
> "We think it was improper for the District Court to threaten the termination of a program which was not tainted with discriminatory action in order to bring about a cure of a separate program which was not tainted with discriminatory action to bring a cure of a separate program which was found to have been so tainted." Id. at 127.

The applicability of Gautreaux to the case at bar is not affected by Judge Oakes' distinction between Title VI which has a so-called pinpoint provision and Title VIII which does not. According to Judge Oakes:

> "Title VI contains language in its so called pinpoint provision that limits the power of the agency to terminate funding 'to the particular program, or part thereof, in which such [discrimination] has been so found.' 42 U.S. §2000d-1 . . . But the same limitation or 'pinpoint provision' does not apply to Title VIII." (Slip Op. at 3894).

But the decision in Gautreaux not to enjoin funds to a non-discriminatory program was not based on the statutory provisions because as noted by the Seventh Circuit that provision was inapplicable. The Gautreaux Court stated "in any event, Section 602 [42 U.S.C. §2000 d-1] does not apply to judicial remedies." 457 F.2d at 135. See also Board of Public Instructions v. Finch, 414 F.2d 106, 1076, n. 13 (5th Cir. 1969).

The rationale of the Court's decision in Gautreaux was public policy. The Court recognized the crucial fact that the real beneficiaries of the federal funds are not the legal entities who nominally are the recipients but the individual citizens who will be adversely affected by the cut-off of such funds. It is essential to consider the interest of these persons. The Court in Gautreaux said:

> "The policy of limiting administrative power to terminate federal funds to activities which only are discriminatory or segregated, was not for the protection of the political entity whose funds were severed, but for the innocent beneficiaries of the programs and activities not tainted by discriminatory tactics . . . . We believe Congress did not desire a policy of forsaking all the beneficial aspects of the Model Cities Program not tainted by discrimination for one aspect of the Program which could be, but not yet been found to be discriminatory." 457 F. 2d at 128.

These same policy considerations are recognized in Board of Public Instruction of Taylor County, Fla. v. Finch, supra at 1075.

Application of these principles virtually dictates a dismissal of the complaint at bar for the additional reason of appellants' failure to state a claim. Here we are confronted with two local entities who have not been found to have violated the Civil Rights Act in connection with any other programs or activities. Clearly, the instant projects are free from any taint of discrimination. The need for the projects and their intrinsic importance to the lives and well being of the individual residents of the Town and King-Greeley are clear. In addition, the environmental, educational and recreational benefits to be derived from the Turner Swamp project will accrue not only to residents of the Town but to countless non-residnets as well.

Conclusion

For each of the foregoing reasons, the judgment of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

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Of Counsel

Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 14th day of OCTOBER 1975

Oct. 14/75 Rich Bachman for Bellman
Attorney for APPELLANTS

Paul J Curran
ATTORNEY FOR APPELLEE

10/14/75